BANK BUMIPUTRA MALAYSIA BHD

v.

SUN CHONG LAND DEVELOPMENT SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-96-1998]
1 OCTOBER 1998

LAND LAW: *Charge - Foreclosure - Order for sale - Right of chargee - Land in possession of receivers and managers - Whether chargee could still be entitled to an order for sale - Whether cause to the contrary established - National Land Code 1965, ss. 255, 256*

The defendant, the registered proprietor of a piece of land ('the land'), had charged the land to the plaintiff in consideration of a banking facility for the amount of RM15,000,000. The defendant defaulted in the repayment of the facility and following that the plaintiff issued a notice in Form 16E demanding the amount due and owing. The defendant failed to comply with the notice, and the plaintiff, hence, applied for an order for sale by public auction of the charged land. The defendant in the meanwhile had been put under receivership, and that being so a question arose as to whether the plaintiff, under the circumstances, could still be entitled to the order for sale as prayed for.

Held:

[1] The plaintiff as the chargee bank is entitled to apply for an order for sale in accordance with the provisions of the National Land Code. There is no such duty accorded to the receivers and managers.

[2] Section 256(3) of the National Land Code must be the guiding principle for the Court to follow before an order of sale of a land can be made. The defendant's affidavit herein, however, did not show the existence of any "cause to the contrary". The court, in the circumstances, would order for the charged land to be sold by way of public auction.

[Application allowed. Order accordingly]

Case(s) referred to:
Buxton & Anor v. Supreme [1992] 2 MLJ 481 ***(refd)***
CI Holding Bhd v. Jabatan Pemegang Harta [1992] 2 MLJ 251 ***(refd)***
Keng Soon Finance Bhd. v. MK Retnam Holdings [1989] 1 CLJ 897 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***
Re Sama Corporation Sdn Bhd; CI Holdings Bhd v. Jabatan Pemegang Harta [1992] 2 MLJ 251 ***(refd)***
Zeno Ltd v. Prefabricated Construction Co (Malaya) Ltd & Anor [1967] 2 MLJ 104 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 255, 256(3)

For the plaintiff - Maniam Kuppusamy; M/s Skrine & Co
For the defendant - Razak Ahmad; M/s Abdul Razak Ahmad & Assoc

Reported by S. Selvarajah

JUDGMENT

Abdul Malik Ishak J:

This was an originating summons filed by Bank Bumiputra Malaysia Berhad ('plaintiff') against Sun Chong Land Development Sdn Bhd ('defendant') in encl. 3 and there the plaintiff sought for the following orders:

(1) An Order that the whole of the land held under Geran No. 24245 for Lot No. 407, Bandar Segamat, Negeri Johor (hereinafter called "the said land") registered in the name of Defendant and charged to the Plaintiff by the Defendant under the terms of a Charge dated the 11th day of June, 1983 under Charge Presentation No. 11084/83 Jilid 1163 Folio 26 and registered by the Registrar of Titles, Negeri Johor, on the 13th day of June, 1983 be sold by public auction;

(2) That the said sale shall be held on or as soon as may be after such date not being less than one month from the date of the Order as this Court may direct;

(3) That the Senior Assistant Registrar do fix a reserve price for the purpose of the sale being a price equal to the estimated market value of the said land;

(4) That the Plaintiff be at liberty to appoint a licensed auctioneer to conduct the sale;

(5) That the Plaintiff be at liberty to bid at the sale, without having to pay any deposit whatsoever, and in the event of the Plaintiff becoming the purchaser the Plaintiff is entitled to set off the purchase price against the amount owing by the Defendant under the Charge on the date of sale plus the costs and expenses of the sale and all costs in this Originating Summons without having to pay any deposit whatsoever towards the purchase price;

(6) That all costs and expenses of and incidental to this application and such sale be taxed on a Solicitor and Client basis by the proper officer of this Court and paid to the Plaintiff out of the proceeds of such sale;

(7) That such further or other directions as this Honourable Court may deem just and proper.

Enclosure 3 was supported by an affidavit of Haji Mohd Yusof Abu Bakar ('Hj. Yusof') in encl. 2 that was affirmed on 8 January 1998 and filed on 21 January 1998. In that affidavit, Hj. Yusof deposed, in his capacity as the deputy general manager of the plaintiff, to the facts which were true and within his own personal knowledge save and except to those facts deposed to on information and belief and from the records maintained by the plaintiff to which Hj. Yusof had access thereto. The facts garnered from encl. 2 may be stated as follows.

The defendant as the registered proprietor of a piece of land held under grant no: 24245, lot no: 407, Bandar Segamat, Negeri Johor ('land') charged that land to the plaintiff in return for a banking facility. In fact on 13 June 1983, the Registrar of Titles, Johore registered the charge dated 11 June 1983 under presentation no: 11084/83, jilid 1163, folio 26 created by the defendant in favour of the plaintiff over the land to secure repayment on demand of all sums by way of banking facility of the principal sum of RM15,000,000 lent to or owing by the defendant to the plaintiff together with interest thereon and other charges due. The charge makes for interesting reading; it contained, *inter alia*, the following provisions material to the present proceedings:

(1) By s. 1.03, the plaintiff agreed in principle to grant to the defendant banking facility of RM15,000,000 upon the terms and conditions contained therein.

(2) By s. 3.03, the defendant covenanted to repay to the plaintiff on demand the principal sum owing by the defendant to the plaintiff together with interest thereon at the rate of 13% per annum with monthly rests or other periodical rests commission and other usual banker's charges and until demand as aforesaid to repay the principal sum and interest thereon by way of ten semi-annual instalments of RM1,500,000 each commencing 36 months after the first drawdown.

(3) By s. 3.05, the defendant covenanted that the plaintiff shall be entitled at any time and from time to time to vary at its discretion the rate of interest payable by notice in writing.

(4) By ss. 3.06 and 3.07, the defendant covenanted that interest shall at the end of each calendar month be capitalised and added to the principal sum then owing and shall thenceforth bear interest at the rate aforesaid but in ascertaining the limit of the principal sum all accumulated and capitalised interest shall not be deemed to be part of the principal sum.

(5) By s. 10.05, the defendant covenanted that if the monies secured under the charge is recovered through any process of land or if the monies shall be placed in the hands of solicitors for collection, the defendant shall pay

in addition to the sum due under the charge the plaintiff's solicitors' fees on a solicitor and client basis and any other fees and expenses incurred.

(6) By s. 10.14, the defendant covenanted that any notice in writing required to be served under the charge shall be sufficiently served on the defendant if addressed to the defendant at its last known address or as stated therein by registered post or left thereat.

The next important event would be on 25 July 1997 because on that date the plaintiff through its solicitors Messrs Skrine & Co. sent by hand to the defendant a notice in Form 16E under s. 255 of the National Land Code, 1965 ('NLC') and demanded payment of the sum of RM34,171,929.06 being the amount owing on the defendant's accounts with the plaintiff as at 18 July 1997 to be made within one month from the date thereof. The defendant ignored and completely failed to comply with that notice in Form 16E. The statement of account of the monies owing by the defendant to the plaintiff as at 30 September 1997 stood as follows:

(a) Amount advanced	.....	RM15,000,000
(b) Total amount of repayments	.....	NIL
(c) Total amount of interest in arrears	.....	RM20,080,057.59
(d) Balance outstanding as at 30 September 1997.	.....	RM35,080,057.59

It was averred that the plaintiff had stopped calculating interest on the outstanding sum. It was also averred that the plaintiff had no knowledge of any person or persons in occupation and/or in posession of the land.

Messrs Abdul Razak Ahmad, Advocates and Solicitors, Johor Bahru entered a memorandum of appearance for the defendant on 13 April 1998 as reflected in encl. 4.

Hj. Yusof deposed another affidavit dated 9 July 1998 which was filed on 16 July 1998 as seen in encl. 6 and there he itemised the outstanding balance due under the charge as at 30 July 1998 to be RM39,440,675.57.

The defendant through Lee Foo Lan affirmed an affidavit-in-reply in encl. 7 on 17 July 1998 which was filed on 28 July 1998 and there he admitted paras. 2 to 6 of Hj. Yusof's affidavit in encl. 2. Lee Foo Lan adverted to civil suit no: 23-15-88 between the present plaintiff and the present defendant which suit had been consolidated with civil suit no: 23-61-94 between the present defendant and the present plaintiff wherein the present defendant sued the present plaintiff for breach of contract in regard to a banking facility

according to the terms as contained in two letters dated 15 April 1983 and 25 March 1985. These two letters were said to be annexed and marked as exhs. "LHS-LA" and "LHS-LB" in encl. 7 but alas, in reality, these two letters were not enclosed at all in encl. 7 – thus depriving this court of the opportunity of perusing through them. It was deposed that the plaintiff's interlocutory applications for summary judgments were dismissed with costs and the matter would be fixed for hearing before the Muar High Court. Lee Foo Lan deposed that the plantiff's application for auction sale, which must surely refer to encl. 3, be stayed pending disposal of civil suit no: 23-15-88 and civil suit no: 23-61-94. These were in briefs the contents of the affidavit of Lee Foo Lan in encl. 7.

Once again, Hj. Yusof affirmed an affidavit on 19 August 1998 which was filed on 21 August 1998 as reflected in encl. 8 and there he deposed that the balance outstanding as at 24 August 1998 stood at RM39,403,740.81. Hj. Yusof further deposed that from 24 August 1998 interest would continue at 13% per annum calculated on monthly basis until the date of the final payment. Daily interest till 24 August 1998 came up to RM14,034.21.

On 30 July 1998 when the matter came up for hearing, Mr. Razak Ahmad, learned counsel for the defendant, informed the court that the defendant was under receivership and that the receivers and managers have been appointed. He also informed the court that he received instructions from the defendant and not from the receivers and managers namely, Messrs Coopers and Lybrand which by right he should have. He cited the case of *Zeno Ltd v. Prefabricated Construction Co (Malaya) Ltd & Anor* [1967] 2 MLJ 104, a decision of Raja Azlan Shah J (as he then was and now His Majesty the Sultan of Perak). *Zeno Ltd* spoke of the receiver's dominant power of taking possession of the property and to collect the income deriving therefrom. His Majesty said that a receiver must exercise the same care regarding the property as an ordinary prudent businessman would in regard to his own property. The receiver was said to be responsible for any loss caused by his negligence or wilful default and in that position he was said to be a trustee of any money due from himself as a receiver. Mr. Maniam Kuppusamy for the plaintiff objected to the request for an adjournment and he chided Mr. Razak Ahmad for not contacting the receivers and managers earlier. I granted the adjournment sought for by Mr. Razak Ahmad and adjourned the matter to 24 August 1998 for hearing.

On 24 August 1998, Mr. Razak Ahmad again repeated that the receivers and managers were appointed on 30 July 1998 and that they had taken possession of the property. It was submitted by Mr. Razak Ahmad that he wrote a letter to Messrs Coopers and Lybrand, the receivers and managers, on 3 August 1998 and told them of their position but no reply came from them. Mr. Razak

Ahmad then referred to encl. 7, the affidavit of Lee Foo Lan, and prayed for an adjournment till the disposal of these cases in Muar High Court which must necessarily meant civil suits numbers 23-15-88 and 23-61-94. This provoked immediate response from Mr. Maniam Kuppusamy. At any rate Mr. Razak Ahmad was magnanimous enough to say that under s. 256 of the NLC the papers were in order and that the order for sale should be made by this court.

Section 256 of the NLC enacts as follows:

> (1) This section applies to land held under –
>
> (a) Registry title;
>
> (b) the form of qualified title corresponding to Registry title; or
>
> (c) subsidiary title,
>
> and to the whole of any undivided share in, or any lease of, any such land.
>
> (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> (3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

and it was clear that the plaintiff as the chargee bank was entitled to apply for an order for sale of the land in accordance with the provisions of the NLC. There was no such duty accorded to the receivers and managers. I am fortified in the view which I have taken by relying on the passages appearing in the judgment of Zakaria Yatim J (now FCJ) in *Re Sama Corporation Sdn Bhd; CI Holdings Bhd v. Jabatan Pemegang Harta* [1992] 2 MLJ 251, particularly at pp. 259 to 260 thereof where his Lordship said:

> In the present case it is the chargee, and not the receiver and manager, who should apply for an order for sale of the land in accordance with the provisions of the National Land Code 1965.
>
> If I am wrong in concluding that the receiver and manager has no capacity or power to apply for an order for sale of the land, the next question to consider is whether the receiver and manager was selling the land at a price based on the true market value?

Mr. Razak Ahmad laid stress on encl. 7 to challenge the application for an order for sale. Section 256(3) of the NLC as reproduced earlier must be the guiding principle for this court to follow before an order for sale of the land

was made. I am fortunate that the Court of Appeal recently had occasion to ventilate their views in regard to s. 256(3) of the NLC as exemplified in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. His Lordship Gopal Sri Ram JCA, lucidly said at pp. 82 to 85 of the report:

> The critical phrase in sub-section 3 of section 256 to which we have lent emphasis, despite having been the subject of judicial pronouncements, continues to demand the attention of courts. There is no doubt that, upon a plain reading of the subsection, a High Court is entitled to refuse an order for sale of charged property once it is satisfied of the existence of cause to the contrary. But the question then arises: what is meant by 'cause to the contrary' ?
>
> In our judgment, 'cause to the contrary' within section 256 (3) may be established only in three categories of cases.
>
> First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in section 340 of the Code establishes cause to the contrary. That section provides as follows:
>
> 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible –
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument;
>
> or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section 2 -
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent –

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-sections (2) and (4)(b) above will be held to have established cause to the contrary under section 256 (3). The decision of Smith J. in *Subchent Kaur v. Chai Sau Kian* [1958] MLJ 32, of the former Federal Court in P*human Singh v. Kho Kwang Choon* [1965] 2 MLJ 189, of Raja Azlan Shah J. [as he then was] in *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124 and that of Edgar Joseph Jr. J. (as he then was) in *United Malayan Banking Corp. Bhd v. Syarikat Perumahan Luas Sdn Bhd (No.2)* [1988] 3 MLJ 352 (affirmed on appeal) sufficiently illustrate the proposition now under discussion.

Secondly, a chargor may show cause to the contrary within section 256 (3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J. in *Murugappa Chettiar v. Letchumanan Chettiar* [1939] MLJ 296 at page 298 where he said:

> I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a chargor, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of

> the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.'

In *Murugappa Chettiar (ibid)*, the appellant was one of two co-proprietors of land. The proprietors jointly charged the land to the respondent as security for a loan. The chargee commenced proceedings under section 149 of the Land Code (Cap 138), the precursor to section section 256 (3), which read as follows:

> After such default in payment or observance continuing for the space of one month from the service of such notice or for such other period as may in such instrument be for that purpose limited, it shall be lawful for the chargee, by summons, to call the proprietor of the charged land before the court to shew cause why the land subject to the charge should not be sold by public auction under direction of the court. If no cause be shewn to the satisfaction of the court, it shall order the public sale of land to take place at such place and time as shall appear most suitable, but not less than four weeks from the date of the order, and it shall be the duty of the registrar of the court to see that such sale is publicly notified during these four weeks in such manner as may be usually adopted for such notifications for the time being, or as shall be regulated by any rules of court in that behalf.

The appellant alleged that he was liable for only half the loan amount and that he had made part payment of that sum. He paid the balance due from him into court and alleged that the other chargor who was liable for the remaining half was the nominee of the respondent chargee. All these allegations were not denied by the respondent chargee. The judge at first instance granted an order for sale without investigating any of these allegations. The FMS Court of Appeal held that there ought to have been an investigation into the unrefuted allegations, allowed the appeal and remitted the matter to the judge for trial of the issues. It was in this context that the remarks by Aitken J. in FMS Court of Appeal in the passage earlier quoted were uttered.

In *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 at page 460, the Privy Council, while acknowledging the existence of the proposition, limited its operation in the following terms:

> Section 256 (3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be

> contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

In a later passage, after reproducing section 340 of the Code, Lord Oliver of Aylmerton who delivered the opinion of the Board said:

> Even assuming - a point which does not arise in the instant case and has not been argued - that this section [i.e. section 340] might not protect a purchaser or chargee acquiring title with actual notice of the equitable interest of a purchaser, their Lordships are quite unable to see how the interest of a purchaser who has expressly consented to the creation of the chargee's interest could prevail over the registered title. Nor, in their Lordships' opinion, could it furnish a 'cause to the contrary' for the purposes of section 256.

It is thus clear that to fall within the scope of the principle in *Murugappa Chettiar's* case, the chargor must be able to point to a statutory direction or some rule of the common law or doctrine of equity operating in his favour and against which an order for sale would militate. Anything that falls short of this requirement will not amount to cause to the contrary under section 256 (3). As was observed by Harun Hashim SCJ (*albeit* in another context) when delivering the judgment of the Supreme Court in *Buxton & Anor v. Supreme Finance (M) Bhd* [1992] 2 MLJ 481 at page 487:

> The issue as to the rights of an innocent purchaser for value, with or without notice of the charge as against a registered chargee has been considered by the courts and is now settled law: see e.g. *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81; *Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54; *Perwira Habib Bank (M) Bhd v. Oon Seng Development Sdn Bhd* [1990] 1 MLJ 47. In all these cases, it was held that the interest of a registered chargee is indefeasible by section 340 (1) of the Code unless it is made defeasible by section 340 (2). The indefeasibility of the chargee's interest is not affected by the chargor's conduct, however unconscionable or deceitful it may be, unless it can be shown that there was collusion between the chargor and the chargee to defeat the interest of a third party. The interest of a *bona fide* purchaser for value cannot prevail over that of a registered chargee.

Perusing through encl. 7, there was no material at all to show "of the existence of cause to the contrary". Indeed encl. 7 merely sought for an adjournment and not to show "the existence of cause to the contrary".

In my view that notwithstanding the proof of default by a chargor the chargee is not automatically entitled to an order for sale nor would the court without scrutinising the material allow his application. The court must scrutinise and

decide whether there are circumstances before it which would amount to a "cause to the contrary" within the meaning of s. 256(3) of the NLC. Embarking on this line of activity, encl. 7 can never assist the defendant to ward off an order for sale. For the reasons aforesaid, I have no choice but to accede to the prayers in encl. 3. The public auction of the land must take place on 25 November 1998.